SHINE ALUMINIUM INDUSTRIES (M) SDN BHD (IN LIQUIDATION) v. LOW KENG SOON

HIGH COURT MALAYA, SHAH ALAM
CHOO KAH SING JC
[ORIGINATING SUMMONS NO: 24NCVC-520-05-2014]
8 DECEMBER 2014

LAND LAW: *Caveat – Removal of – Application for – Defendant allegedly purchased land from chargee bank – Whether chargee bank has right to offer to sell or accept offer for purchase of charged property – Whether chargee bank competent party to contract in sale of charged property by way of private treaty – Contracts Act 1950, s. 11 – Whether there was valid binding contract over sale of land – Whether defendant had caveatable interest – Whether there were serious issues to be tried – Whether defendant discharged onus of showing why caveat should not be removed – National Land Code, s. 327*

The plaintiff filed this originating summons pursuant to s. 327 of the National Land Code ('NLC'), seeking an order to remove a private caveat entered by the defendant on a piece of land ('the land') that belonged to the plaintiff. The plaintiff, a company, was at all material times, the registered owner of the land. On 9 March 2007, the plaintiff was wound up by a court order. In March 2013, an officer from the chargee bank, CIMB Bank Bhd, asked the defendant, an individual person, whether he would be interested to purchase the land. On 21 March 2013, the defendant wrote to the chargee bank and offered to purchase the land for a consideration of RM860,000. The chargee bank returned the said cheque to the defendant and informed the defendant that they were in the midst of appointing a liquidator, and the liquidator would liaise with the defendant once the process of appointment had been completed. On 22 April 2013, a letter was issued by the chargee bank to the defendant on a strictly without prejudice basis, agreeing to accept the defendant's offer to buy the land for the said consideration. On 15 May 2013, the defendant sent a letter to the chargee bank enclosing a cheque for the sum of RM86,000 being payment of 10% deposit of the purchase price. On 30 September 2013, one Miss Tan on behalf of the defendant, went to the office of the chargee bank to deliver a cheque being the final settlement sum for the purchase price of the said land. However, on 2 December 2013, the chargee bank sent a letter to the defendant returning the defendant's cheque and together with it enclosed a banker's cheque for a sum of RM86,000 payable in favour of the defendant. The chargee bank stated that it could not accept the payment because the transaction had been terminated due to the reason that the liquidator did not consent to the sale of the land by way of a private treaty. The defendant lodged a private caveat on the land. The liquidator wrote to the defendant and demanded him to withdraw his caveat failing which necessary legal action would be taken against him for

the removal of the said caveat. The defendant did not comply with the demand. Hence, this originating summons was filed by the liquidator on behalf of the plaintiff.

Held (allowing plaintiff's application):

(1) Where there is a valid binding contract for a sale of land, a purchaser, when he performed his side of the contract, acquires a right *ad rem* which is also a right *in personam*. Once a purchaser acquires a right *ad rem* or a right *in personam* through a valid binding contract for a sale of land, his right to a caveatable interest over the land will follow. Hence, in this instant case, the onus was on the defendant to show that he had a valid binding contract of sale over the land, and that gives him a right *ad rem* and/or *in personam*, which entitled him a caveatable interest. (paras 19-22)

(2) A registered chargee does not have a right to offer to sell or accept an offer for purchase of a charged property by way of a private treaty in order to recover its monies. A sale by way of a private treaty is in effect contracting out of the NLC which is not allowed by the courts. Pursuant to s. 11 of the Contracts Act 1950, the chargee bank herein was therefore considered as a party not competent to contract in a sale of a charged property by way of private treaty. The general rule of a void agreement is not enforceable under the law (s. 2(g) Contracts Act 1950). (paras 25 - 26)

(3) Based on the case *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra (M) Bhd,* it was incorrect to say that the right to the company's property under a charge will pass to the chargee when the company is under liquidation or wound up. The liquidator is not to take instruction from the chargee; he acts independently and in accordance with the law. (para 30)

(4) The defendant did not have a caveatable interest. On that ground alone, it was sufficient for the court to allow the plaintiff's application. As to whether the defendant had raised a serious question to be tried in order to maintain the caveat, the defendant had not commenced proceedings timeously to enforce what he perceived to be his rights under the purported agreement to show that he had raised a serious question to be tried. It would thus be unjust to prevent the plaintiff or the liquidator from continuing to deal with the land, because there was no matter or serious question to be tried. The defendant had failed to discharge the onus of showing why his caveat should not be removed. (paras 36 & 37)

Case(s) referred to:

Bachan Singh v. Mahinder Kaur & Ors [1956] 1 LNS 14 HC ***(refd)***
Eng Mee Yong & Ors v. Letchumanan [1979] 1 LNS 18 PC ***(refd)***
Government of Malaysia v. Gurcharan Singh & Ors [1970] 1 LNS 30 HC ***(refd)***
Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors [1997] 3 CLJ 274 SC ***(refd)***

Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd [1992] 1 CLJ 20; [1992] 1 CLJ (Rep) 150 SC ***(refd)***
Leha Jusoh v. Awang Johari Hashim [1977] 1 LNS 59 FC ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng [1995] 2 CLJ 713 CA ***(refd)***
Macon Engineers Sdn Bhd v. Goh Hooi Yin [1976] 1 LNS 67 FC ***(refd)***
Murugappa Chettiar Lakshmanan (Wasi Tunggal Harta Pesaka MRL Murugappa Chettiar, Simati) v. Lee Teck Mook [1995] 2 CLJ 545 CA ***(refd)***
Nanyang Development (1966) Sdn Bhd v. How Swee Poh [1969] 1 LNS 116 FC ***(refd)***
Official Receiver and Provisional Liquidator Maril-Rionebel (M) Sdn Bhd v. Anafartalar Caddesi Sdn Bhd [2006] 2 CLJ 757 HC ***(refd)***
Ooi Boon Leong & Ors v. Citibank NA [1984] 1 LNS 26 PC ***(refd)***
Paya Terubong Estate Sdn Bhd v. Pusaka Warisan Sdn Bhd [1998] 2 CLJ 909 CA ***(refd)***
Tan Hee Juan by His Next Friend Tan See Bok v. Teh Boon Keat And Lai Soon [1933] 1 LNS 101 HC ***(refd)***
Tan Leng Choo & Ors v. Law Teck Huat [2008] 1 LNS 568 CA ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 2(g), 11
National Land Code, ss. 323, 327

Other source(s) referred to:
Visu Sinnadurai, *Law of Contract,* 4th edn, vol 1, pp 628, 682, 683, paras 8.118, 8.196

For the plaintiff - Lau Kee Sern (Wong Dan Yi with him); M/s Shook Lin & Bok
For the defendant - Counsel not present; M/s Nordin Kassim & Aziz

Reported by Suhainah Wahiduddin

JUDGMENT

Choo Kah Sing JC:

Introduction

[1] The plaintiff filed this originating summons pursuant to s. 327 of the National Land Code ('NLC') on 8 May 2014. The plaintiff sought from the court, *inter alia*, an order to remove a private caveat entered by the defendant on a piece of land held under title GM 3641, Lot 1199, Tempat Sungai Chu, Mukim Serendah, Daerah Hulu Selangor, Selangor Darul Ehsan ('the land') that belongs to the plaintiff.

[2] The parties had filed and exchanged several affidavits. On 31 October 2014, the originating summons came before me. The defendant's counsel was not present during the hearing. The defendant's counsel through the plaintiff's counsel informed the court that he will rely on his three pages of written submissions for the hearing. The plaintiff's counsel submitted that he will rely on his written submissions supported by two bundles of authorities. The defendant's counsel did not provide any bundle of authority to the court. After having considered the written submissions and affidavits of the parties, I allowed the application. This is my reasoned decision as below.

The Salient Facts

[3] The plaintiff is a company. At all material times, the plaintiff was the registered owner of the land. On 9 March 2007, the plaintiff was wound-up by a court order under Petition No. D7-28-899-2006. The winding-up petition was filed by Malayan Bank Bhd.

[4] On 3 June 2013, Saw Eng Guan, a private liquidator, was appointed as the liquidator of the plaintiff in replacement of the official receiver under a court order. It was CIMB Bank Bhd ('the chargee bank') who took out an intervener application for the said court order.

[5] The defendant is an individual person. On or around March 2013, an officer from the chargee bank asked the defendant whether he would be interested to purchase the land as the owner (the plaintiff) of the land had been wound-up.

[6] On 21 March 2013, the defendant wrote to the chargee bank and offered to purchase the land for a consideration of RM860,000 and enclosed a HLB cheque payable in favour of the chargee bank with a sum of RM17,000 being payment of 2% of the purchase price as earnest deposit.

[7] The said cheque was returned to the defendant by the chargee bank *via* a letter dated 17 April 2013 ('the first letter'). The chargee bank informed the defendant that they were in the midst of appointing a liquidator, and the liquidator would liaise with the defendant once the process of appointment has been completed.

[8] On 22 April 2013, the chargee bank wrote a letter to the defendant ('the second letter'). In this second letter the chargee bank, on a strictly without prejudice basis, agreed to accept the defendant's offer to buy the land for a consideration of RM860,000, subject to the following terms and conditions:

1. Appointment of private liquidator from the High Court for purpose of disposal of the property by way of private treaty.
2. You are to forward us the 10% deposit of RM86,000.00 payable to CIMB Bank Berhad' on or before 31/05/2013.
3. Remaining balance of RM774,000.00 is to be paid on or before 31.7.2013.

[9] On 15 May 2013, the defendant sent a letter to the chargee bank enclosing a HLB cheque for a sum RM86,000 made payable in favour of the chargee bank being payment of 10% deposit of the purchase price. On 8 July 2013, the defendant sent another letter to the chargee bank requesting permission to extend for another two months from 31 July 2013 to pay the balance purchase price. The chargee bank agreed, *vide* letter dated 23 July 2013 ('the third letter').

[10] On 30 September 2013, one Ms Tan, on behalf of the defendant, went to the office of the chargee bank at Menara UAB to deliver a letter dated 29 September 2013 enclosing a HLB cheque for a sum of RM774,000 payable in favour of the chargee bank being the final settlement sum for the purchase price of the said land.

[11] However, on 2 October 2013, the chargee bank sent a letter ('the fourth letter') to the defendant returning the defendant's cheque and together with it enclosed a banker's cheque for a sum of RM86,000 payable in favour of the defendant. The chargee bank stated in the fourth letter that one of its employees, Ms Chow Wai Fun, had communicated to Ms Tan that she could not accept the payment from Ms Tan because the transaction had been terminated earlier due to the reason that the liquidator did not consent to the sale of the land by way of a private treaty.

[12] On 30 September 2013, the defendant lodged a private caveat on the land *via* Presentation No: 1422/2013.

[13] On 21 February 2014, the liquidator through his solicitors wrote to the defendant and demanded him to withdraw his caveat failing which necessary legal action would be taken against him for the removal of the said caveat. The defendant did not comply with the demand. Hence, this originating summons was filed by the liquidator on behalf of the plaintiff.

The Issues

[14] The main issue for this court to consider is whether the defendant's caveat should be removed or not. The procedure to be adopted to consider this issue was set down by the Court of Appeal in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng* [1995] 2 CLJ 713; [1995] 1 MLJ 721. Firstly, the court has to examine the grounds expressed in the application for the caveat to see whether they show a caveatable interest (the first stage). Once the court is satisfied that the caveator's claim amounts in law to a caveatable interest, it must then go on to consider whether the claim discloses a serious question meriting a trial (the second stage). After these two stages have been crossed, the court must decide where the balance of convenience lies (the last stage) (see p. 724). This approach was reaffirmed by the Court of Appeal in *Murugappa Chettiar Lakshmanan v. Lee Teck Mook* [1995] 2 CLJ 545; [1995] 1 MLJ 782.

[15] Any person or body who claims either the title to land or any registrable interest in land, or any right to such title or interest would have a caveatable interest. The onus is on the caveator, in this case the defendant, to satisfy the court why his caveat should not be removed (see *Nanyang Development (1966) Sdn Bhd v. How Swee Poh* [1969] 1 LNS 116; [1970] 1 MLJ 145; *Eng Mee Yong & Ors v. Letchumanan* [1979] 1 LNS 18; [1979] 2 MLJ 212; *Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd* [1992] 1 CLJ 20; [1992] 1 CLJ (Rep) 150; [1992] 1 MLJ 263).

[16] The claim of the caveator that he has a right to lodge a caveat must be minutely inquired into in order to decide whether the caveat should remain on the register document of title or be removed (see *Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd* (*supra* CLJ), p. 161).

[17] Having identified the main issue and having in mind all the principles revolving around the main issue, I now turn to the defendant's case to examine whether he has any caveatable interest.

The Defendant's Case

The First Stage – Caveatable Interest

[18] In substance, the defendant averred that his right to lodge a private caveat arose from a purported agreement between the chargee bank and himself to sell and purchase the land by way of a private treaty; and upon learning that the liquidator had refused to effect the purported agreement, the defendant lodged the caveat to protect his interest.

[19] It is stated that where there is a valid binding contract for a sale of land, a purchaser, when he performed his side of the contract, acquires a right *ad rem* which is also a right *in personam* (see *Bachan Singh v. Mahinder Kaur & Ors* [1956] 1 LNS 14; [1956] MLJ 97, at pp. 97-98). Once a purchaser acquires a right *ad rem* or a right *in personam* through a valid binding contract for a sale of land, his right to a caveatable interest over the land will follow.

[20] Hence, in this instant case, the onus is on the defendant to show that he has a valid binding contract of sale over the land, and that gives him a right *ad rem* and/or *in personam* which entitles him a caveatable interest.

[21] The right *ad rem* or *in personam* can only be acquired by the defendant if and only if there is a valid binding contract for the sale of the land.

[22] The plaintiff's counsel contended that the chargee bank has no right in law to sell the land by way of a private treaty. In other words, the plaintiff's counsel contended that there was no valid binding contract, which means the defendant did not acquire a right *ad rem* and/or *in personam*.

[23] The plaintiff's counsel cited *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd* [1997] 3 CLJ 274 at p. 291; [1997] 2 MLJ 805 at p. 817, it states:

> … whereas under the statutory charge under the Code, the rights and powers of the charge are not derived from such estate since none is vested in him and so his rights and powers must flow from the relevant provisions of the Code with the charge taking effect as a security only, enforceable by proceedings in court to obtain a judicial sale.

[24] It is clear from *Kimlin Housing Development Sdn Bhd* that for a chargee to recover its money from a charged property which is created under the NLC as security for a loan, the chargee's recourse has to come from the NLC *vis-à-vis* remedies under Part Sixteen Chapter Three of the Code.

[25] A registered chargee, such as the chargee bank in this instant case, does not have a right to offer to sell or accept an offer for purchase of a charged property by way of a private treaty in order to recover its monies. A sale by way of a private treaty is in effect contracting out of the NLC which is not allowed by the courts (see Visu Sinnadurai, *'Law of Contract'*, 4th edn, Vol 1, p. 628 para. 8.118, pp. 682-3, paras. 8.195-6; *Ooi Boon Leong & Ors v. Citibank NA* [1984] 1 LNS 26; [1984] 1 MLJ 222).

[26] Case law has showed a chargee bank is disqualified as a competent party to enter into a contract to offer to sell or to accept an offer for purchase by way of a private treaty of a property charged as security for a loan created under the NLC when a chargor has defaulted in servicing the loan. Pursuant to s. 11 of the Contracts Act 1950, the chargee bank is therefore considered as a party not competent to contract in a sale of a charged property by way of private treaty. Section 11 renders such agreement void (see *Tan Hee Juan by His Next Friend Tan See Bok v. Teh Boon Keat And Lai Soon* [1933] 1 LNS 101; [1934] MLJ 96; *Government of Malaysia v. Gurcharan Singh & Ors* [1970] 1 LNS 30; [1971] 1 MLJ 211, *Leha Jusoh v. Awang Johari Hashim* [1977] 1 LNS 59; [1978] 1 MLJ 202). The general rule of a void agreement is not enforceable under the law (see s. 2(g) of the Contracts Act 1950).

[27] The defendant's counsel did not submit to this court that the defendant has a valid and enforceable contract which gave rise to a right in law to the defendant to lodge a caveat under s. 323 of the NLC. I think the defendant's counsel has failed to appreciate this crucial point. He merely stated there was a sale and purchase transaction between the chargee bank and the defendant.

[28] Further, what the defendant's counsel submitted in his written submission at para. 3 was: "Iaitu defendan mempunyai tuntutan ke atas hakmilik hartanah tersebut setelah keseluruhan pembayaran jualbeli dibuat sementara pelikuidasi dilantik oleh CIMB …" this is not entirely correct. The money that was paid to the chargee bank on 15 May 2013 was refunded to the defendant on 2 October 2013 (in the fourth letter). As for the balance sum, the employee of the chargee bank refused to accept the defendant's cheque on 30 September 2013.

[29] The defendant's counsel also submitted that the appointment of a liquidator by the chargee bank was because there was a buyer, which was the defendant, and the liquidator was to facilitate the sale transaction. He further submitted that the plaintiff had no more right over the land and in fact that right has shifted to the chargee bank. But, the defendant's counsel did not cite any authority in support of such proposition.

[30] The plaintiff's counsel referred this court to the case *Official Receiver and Provisional Liquidator Maril-Rionebel (M) Sdn Bhd v. Anafartalar Caddesi Sdn Bhd* [2006] 2 CLJ 757; [2006] 4 MLJ 1. In substance, the court in that case recognises a liquidator's right to sell the property of a company under

liquidation, and that he acts as an agent of the company. This legal proposition is supported by *Kimlin Housing Development Sdn Bhd (supra)* as correctly submitted by the plaintiff's counsel. Based on the above case law, it is incorrect to say that the right to the company's property under a charge will pass to the chargee when the company is under liquidation or wound-up. The liquidator is not to take instruction from the chargee; he acts independently and in accordance with the law.

[31] The defendant's counsel relied on the case *Kumpulan Sua Betong Sdn Bhd (supra)* and submitted that all the defendant has to show is that he has a claim over the land, and that alone would suffice for the caveat to remain. He also submitted that so long as the defendant has raised a serious question to be tried, the caveat ought to be maintained. Whether the agreement is valid or not it has to be determined at the trial stage by calling witnesses from both sides, submitted the defendant's counsel.

[32] This court disagrees with the approach taken by defendant's counsel by merely making bare statements that the defendant has a claim over the land arising out of a purported sale and purchase agreement without showing there was a valid contract.

[33] I am of the considered view that in order for a caveat to maintain on the register document of title, the defendant has to first satisfy the court that there is a valid contract. That should not be determined at the trial stage. In *Macon Engineers Sdn Bhd v. Goh Hooi Yin* [1976] 1 LNS 67; [1976] 2 MLJ 53, at pp. 54-55, the Federal Court held:

> … so long as there is *in existence a valid agreement* (emphasis added) for the sale of land, the purchaser is entitled to lodge a caveat to protect his rights under the contract and sue for specific performance of the agreement.

[34] Hence, a caveator has to first show that there is a valid contract before he can assert he has a caveatable interest. See also *Tan Leng Choo & Ors v. Law Teck Huat* [2008] 1 LNS 568; [2009] 1 MLJ 820; and *Murugappa Chettiar Lakshmanan v. Lee Teck Mook* [1995] 2 CLJ 545 *(supra)*; which have been correctly cited by the plaintiff's counsel.

[35] As explicated in the earlier part of this judgment, it is a valid agreement that confers the right *ad rem* and/or *in personam* on a purchaser which in turn gives rise to a caveatable interest.

[36] After having minutely inquired into the defendant's claim that he has a right to lodge the caveat, I hold that the defendant does not have a caveatable interest, and therefore, he has failed to cross the first stage. On that ground alone, it is sufficient for this court to allow the plaintiff's application. However, for the sake of completeness, I will proceed to deal with the counsel's submission which states that so long as the defendant has raised a serious question to be tried, the caveat should be maintained. To deal with

A that submission, I refer to the case *Paya Terubong Estate Sdn Bhd v. Pusaka Warisan Sdn Bhd* [1998] 2 CLJ 909; [1988] 2 MLJ 463, wherein the Court of Appeal observed that the trial judge failed to appreciate that when there no action has been commenced by the caveator, in that case the respondent, there is no 'matter to be tried' (see p. 467). As such, it is incumbent upon
B the defendant in this instant case to commence proceedings timeously to enforce what he perceived to be his rights under the purported agreement to show that he has raised a serious question to be tried. Since he has not done so, it would be unjust to prevent the plaintiff or the liquidator from continuing to deal with the land, because there is no matter or serious
C question to be tried.

[37] Based on the above reasoning, I hold that the defendant has failed to discharge the onus of showing why his caveat should not be removed. The defendant has failed to cross the first stage as well as the second stage, thus, there is no reason to consider the last stage.

D **Decision**

[38] Based on the above reasoning, I allowed the plaintiff's application with costs of RM3,000.

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